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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-456

HON. JOHN HILL, ATTORNEY GENERAL OF THE STATE OF TEXAS, HON. MARK WHITE, SECRETARY OF STATE OF THE STATE OF TEXAS, and HON. CAROL S. VANCE, DISTRICT ATTORNEY FOR HARRIS COUNTY, TEXAS,

Appellants,

VS.

PRINTING INDUSTRIES OF THE GULF COAST, MARION COLEMAN, GRADY FITCH AND CHARLES DRAKE, Individually, and on behalf of all persons similarly situated,

Appellees

APPELLEES' MOTION TO AFFIRM

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To the Honorable Justices of the United States Supreme Court:

COME NOW the Appellees in the above captioned case and file this their Motion to Affirm the judgment of the Three-Judge District Court rendered August 20, 1974, and in support thereof would respectfully show unto this Honorable Court as follows:

STATEMENT OF THE CASE

The most serious dangers to constitutional liberties come not from evil-minded rulers whose malevolent motives and tyrannical actions are all to obvious, but from beneficient,

well-meaning individuals who, in their zeal to achieve socially desirable ends, allow subtle but insidious encroachments upon precious freedoms, often in a manner appearing relatively unobstrusive or insubstantial, but oblivious to the inevitable cataclysm born of the continued gradual erosion of fundamental rights. That basic principle is what this case (indeed, all cases regarding First Amendment limitations on governmental action) is all about — the ominous threat to our Bill of Rights posed by a superficially inocuous State statute conceived by men of the highest motives, but facially incompatible with the dictates of the First Amendment.

HISTORY OF THE CASE

In 1973, the 63rd Legislature of the State of Texas enacted House Bill No. 4, amending Article 14.10(b) of the Texas Election Code to provide as follows:

> "Any printed or published political advertising shall also have printed on it the name and address of the printer or publisher and the person paying for the advertising."

The amendment became effective on June 14, 1973, and provided sanctions for its violation by fine of not less than $100 nor more than $5,000 or imprisonment not less than one year nor more than 5 years or both such fine and imprisonment.

On September 11, 1973, less than three months after the new law had become effective, and before any major elections to which it would apply, the Appellees herein filed suit in the Southern District of Texas alleging that the above quoted provision of Article 14.10(b) as amended is unconstitutional and void on its face because of its interference with the Appellees' rights to political and associational privacy and anonymity (as established by *Talley* v. *California,* 1960, 362 U.S. 60, 80 S.Ct. 536, 4

L.Ed.2d 559; and *NAACP* v. *Alabama,* 1958, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488); because of its abridgment of freedom of the press (cf. *Miami Herald Publishing Co.* v. *Tornillo,* 1974 U.S. , 94 S.Ct. 2831); and because of its vagueness and imprecision. The Appellees alleged under oath and subsequently presented uncontradicted testimony to substantiate that they had reason to fear and did fear that they would suffer intimidation, harassment and reprisals if they were required to associate themselves openly and publicly with particular political candidates or positions in the manner required by the statute, that the statute possesses an inherent and substantial danger that persons seeing the Appellees' names on political advertising would mistakedly believe that the Appellees were thereby endorsing that candidate or political position, and that the statute had an unconstitutional and irreparable "chilling effect" on the exercise of First Amendment rights. In addition, the Appellees alleged that they were unable to determine the exact requirements of the penal statute because the term "person paying for the advertising" is not defined and, therefore, the Appellees were unable to ascertain whether such term refers to advertising agencies, individual advertising agents, political committees, their chairmen, political donors, political candidates, or some other individual or entity.

Pursuant to 28 USCA §§2281 and 2284, a Three-Judge District Court was convened and a hearing was held on February 20, 1974. Multitudinous and voluminous briefs were filed by Appellants, Appellees and Amici Curiae, and on August 20, 1974, the Three-Judge District Court rendered a 40-page opinion agreeing with the Appellees' constitutional claims on all points and unanimously declaring the amendment to Article 14.10(b) to be unconstitutional in each respect urged by the Appellees. An Order embodying that opinion, declaring the statute unconstitutional and enjoining its enforcement was also rendered on August 20, 1974.

The Court below considered the arguments in depth and concluded:

> "The first amendment rights to freedom of speech and press exist not only because the authors of the Bill of Rights wished to humor the eccentricities of the man on the soap box but because they wished to secure forever the *means* of making the United States a free market place of ideas. The human voice and the human pen are vital to this goal but no more vital than the physical printing press itself and the persons who operate it. All of these rights exist because of the same goal. Who can say that in achieving the goal any one element is more important or that because one element has commercial aspect it lacks standing to protect itself. All of these rights are so closely bound together that the goal they were created to achieve will fail should any one be curtailed. To say that the right of the printer physically to print the written word can be distinguished from the right of the author to have his words printed because the printer has no interest in the ideas he prints (his interest being in receiving a fee for his printing) is to ignore not only the clear language of the first amendment but the scheme behind that amendment." Court's Opinion at p. 3.
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> "It is important to realize this when treating the instant case because in our zeal to secure individual first amendment rights it often becomes hard to see that the ideal of free men governed by free men is just as dependent upon the vehicle of free speech — a free press. Not just the freedom to write one's own tract, print it in one's basement, and distribute it on the street corner is at stake but the freedom to go to a printer in the business of printing what comes over the counter, pay him, and have printed one's tract is at stake. The purpose of the first amendment was to protect the person who only operates the press as much as the author-printer, not so much because otherwise the commercial printer might lose money but because without the printer many an author could not disseminate his ideas. Unless the mere printer has a right which is

> greater than that of the ordinary businessman, not only his self-interest will be harmed but the purpose of the first amendment will be defeated. It is in the public interest to keep printers in business and to keep speakers and writers speaking and writing. That public interest has historically been assertable not only by the individual author and speaker but by the printer and publisher as well."

Court's Opinion at p. 8.

ARGUMENT AND AUTHORITY

I.

ARTICLE 14.10(b) OF THE TEXAS ELECTION CODE UNCONSTITUTIONALLY INFRINGES UPON APPELLEES' RIGHTS TO POLITICAL AND ASSOCIATIONAL PRIVACY AND ANONYMITY, GUARANTEED TO THEM BY THE FIRST, NINTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

At least two distinct rights are involved in this case — freedom to print political material anonymously (encompossed in freedom of the press and freedom of speech) and the right to associate privately (included within the right to assemble).

The Right to Print Anonymously

That there exists a constitutional right to print political material anonymously cannot be seriously contested, particularly when due consideration is given to historical perspective. It is obvious why the Founding Fathers intended associational and political privacy to be zealously preserved — had the publisher of Thomas Paine's *Common Sense* been required to print his name and address on that political leaflet, or had Alexander Hamilton been prohibited from distributing his political writings without disclosing

the name of the person paying for his anonymous publications, we might not have a Bill of Rights to be preserving today. Indeed,

> "[a]nonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind. Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all. The obnoxious press licensing law of England, which was also enforced on the Colonies was due in part to the knowledge that exposure of the names of the printers, writers and distributors would lessen the circulation of literature critical of the government. The old seditious libel cases in England show the lengths to which government had to go to find out who was responsible for books that were obnoxious to the rulers. John Liburne was whipped, pilloried and fined for refusing to answer questions designed to get evidence to convict him or someone else for the secret distribution of books in England. Two Puritan Ministers, John Penry and John Udal, were sentenced to death on charges that they were responsible for writing, printing or publishing books. Before the Revolutionary War colonial patriots frequently had to conceal their authorship or distribution of literature that easily could have brought down on them prosecutions by English-controlled courts. Along about that time the Letters of Junius were written and the identity of their author is unknown to this day. Even the Federalist Papers, written in favor of the adoption of our Constitution, were published under fictious names." *Talley* v. *California,* 1960, 362 U.S. 60, 64-65, 80 S.Ct. 536, 538-39, 4 L.Ed.2d 559.

Thus, of historical necessity, freedom of the press encompasses freedom to print anonymously. Any other reading of the First Amendment is to betray the lessons of history at a cost of inviting tyranny. Accordingly, any statutory enactment which requires the source of political material to be publicly revealed is automatically suspect.

That this constitutional guarantee is as vital today as it was 200 hundred years ago is made unequivocally clear by Mr. Justic Black's opinion for the Court in *Talley* v. *California, supra.* In that case, the Court reviewed and declared "facially unconstitutional" a Los Angeles municipal ordinance which required that handbills have printed on them, among other things, the name and address of the person who printed, wrote, compiled or manufactured the leaflet. "There can be no doubt that such an identification requirement would tend to restrict freedom to distribute information and thereby freedom of expression," Justice Black wrote. "[E]xposure of the names of printers, writers and distributors would lessen the circulation of literature critical to the government." *Talley, supra,* 362 U.S. at 64, 80 S.Ct at 538. See also *Zwickler* v. *Koota,* 1966, 389 U.S. 241, 88 S.Ct. 391, 19 L.Ed2d 444, on remand, Three-Judge District Court, S.D.N.Y., 1968, 290 F.Supp. 244, *vacated as moot* sub. nom. *Golden* v. *Zwickler,* 1969 394 U.S. 1031, 89 S.Ct. 956, 22 L.Ed.2d 113; *Opinion of the Justices,* Mass., June 29, 1972, 41 L.W. 2020; *New York* v. *Duryea,* N.Y. S.Ct. [42 L.W. 2420, January 24, 1970].

Article 14.10(b) ignores these teachings and contravenes the principal that printers of political publications are constitutionally immune from being required to disclose publicly their identities. The printers have alleged and proved that public disclosure of the name of printers of political materials results in economic and other reprisals against the printers by supporters of the opposing political view. Moreover, they demonstrated under oath a legitimate, bona fide fear of intimidation, harassment and reprisal, if required to print their names on all political advertising. On its face Article 14.10(b) demands that printers of political advertising abandon their rights to print anonymously if they choose to exercise their right to print such material. Plainly, such a requirement is inconsistent with the lessons of the past and incompatible with

the Bill of Rights, which wisely in the light of historical perspective, guarantees the printers the right to print political matter without revealing their identity.

The Right to Associational Privacy

There is a second way in which Article 14.10(b) infringes on the Printers' constitutional rights. Not only does it deprive them of the right to print anonymously, it also inhibits their rights to associational privacy. The statute requires that a printer publicly disclose that he has, in whatever manner, supported a particular candidate or position. The printer cannot avoid revealing that he has assisted that particular candidate or political group in some manner — at the very least, by not refusing to undertake political advertising printing for them. By inevitably producing this result of disclosing political association, the statute contravenes the teachings of a long line of Supreme Court cases protecting individuals against disclosure of their political affiliations.[1] See *N.A.A.C.P.* v. *Alabama,* 1958, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488; *Bates* v. *City of Little Rock,* 1960, 361 U.S. 516, 80 S.Ct. 412, 4 L.Ed.2d 480; *Louisiana ex. rel Gremillion* v. *N.A.A.C.P.,* Three Judge, E.D.La., 1961, 181 F.Supp. 37, *aff'd.,* 366 U.S. 293, 81 S.Ct. 1336; *Gibson* v. *Florida Legislative Committee,* 1962, 372 U.S. 539; *Shelton* v. *Tucker,* 1960, 364 U.S. 479, 81 S.Ct. 247, 5 L.Ed.2d 231; *Pollard* v. *Roberts,* E.D.Ark., 1968, 283 F.Supp. 248, *aff'd.,* 393 U.S. 14; *Lamont* v. *Postmaster General,* 1965, 381 U.S. 301, 85 S.Ct. 1493, 14 L.Ed.2d 398; *DeGregory* v. *United States,* 383 U.S. 825, 86 S.Ct. 1148, 16 L.Ed.2d 292; *United States Servicemen's Fund* v. *Eastland,* D.C.Cir., 1973, 488 F.2d 1253, cert.

[1] The right to associational privacy runs two ways – it precludes the state from demanding membership information from the association (as in *N.A.A.C.P.* v. *Alabama* and *Bates* v. *City of Little Rock*) and it also prevents the State from requiring the individual to reveal the organization of which he is a member (as in *Shelton* v. *Tucker* and *Lamont* v. *Postmaster*).

granted sub. nom. *Eastland* v. *U.S. Servicemen's Fund,* Oct. 15, 1974, 43 L.W. 3208.

"The rationale of those decisions is that the First and Fourteenth Amendments protect rights to associate together to advocate and promote legitimate albeit controversial, political, social or economic actions; that when the objective of the group or the group itself is unpopular at a given time or place, revelation of the identities of those who have joined themselves together or have affiliated with the group may provoke reprisals from those opposed to the group or its objectives; and that the occurrence or apprehension of such reprisals tends to discourage the exercise of the rights which the Constitution protects." *Pollard* v. *Roberts, supra,* 283 F.Supp. at 256.

Moreover, "it is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute [an]***effective***restraint on freedom of association***. This Court has recognized the vital relationship between freedom to associate and privacy in one's associations***. Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs." *NAACP* v. *Alabama, supra.* Not only the Courts but also the commentators have generally conceded the obvious — that "forcing a man to disclose his identity may have such a powerfully deterrent effect upon the exercise of political rights as to render them meaningless." Redish, Campaign Spending Laws and the First Amendment, 46 N.Y.U.L.Rev. 900, 934 (1971). See also Campaign Financing, 9 Harv.J.L. 359, 405 (1972). One primary cause of political apathy is said to be the serious fear that open political involvement may tend to alienate friends, neighbors and employers. Rosenberg, Some Determinants of Political Apathy in American Democracy: Esays on Image and Realities 28, 29-30 (1964). Embarrass-

ment, reprisal and other direct harms from public participation in political activities are evident and repressive. The fear of losing customers by appearing to support a candidate or position opposed by the customer is real and pressing to the printers, as common sense would indicate. More importantly, it is the small printer — the "little man" — who can least afford to offend his customers. Article 14.10(b) requires that he take this and other risks, however, if he chooses to exercise his constitutional right to print political material.

In doing so, Article 14.10(b) infringes rights to associational privacy. In the first place, as the evidence in this case shows, there is a substantial probability that persons seeing printers' names on political advertising will mistakely consider the disclosure an endorsement of that candidate by the printers. Secondly, the statute requires that the printer reveal that he has been of some assistance to the candidate, whether the printer desires that fact be publicly known or not. The choices posed by the statute are intolerable — either avoid the possibility of reprisal by refusing to undertake political advertising or abandon constitutional rights of associational privacy. The first choice produces a classic example of the "chilling effect" doctrine; the latter results in direct abridgement of fundamental rights.

> "In the midst of the current zeal to prevent the fraudulent campaign practices that seem to have prevailed in the 1972 election year, legislatures and Courts should not lose sight of that which is most fundamental to our society. The importance of the lone dissenter cannot be overestimated. To undermine the right to speak anonymously is to jeopardize this ability to dissent."

Concurring Opinion at p. 8.

Thus, as has been seen, Article 14.10(b) plainly encroaches on First Amendment rights. It ignores the fundamental right to print anonymously (a necessary concomitant of freedom of the press) and it requires disclosure of participation in political activities in derogation of rights to political and associational privacy, necessary corollaries of the First and Ninth Amendment freedoms to assemble. Its unconstitutionality is, as the Three-Judge District Court unanimously concluded, transparent.

Consideration of State Interest

Of course, the fact that a particular statutory enactment infringes upon constitutional liberties, does not automatically render the statute invalid. On the other hand, state action infringing upon the exercise of First Amendment rights cannot be sustained unless the governmental interests asserted to support such impingement are "compelling" and the State has shown that no alternative forms of regulation would combat the abuses without infringing First Amendment rights as severely. *Shelton v. Tucker,* 1960, 364 U.S. 479, 487-490, 81 S.Ct. 247, 251-253, 5 L.Ed.2d 231; "When legitimate legislative concerns are expressed in a statute which imposes a substantial burden on protected First Amendment activities, Congress must achieve its goal by means which have 'less drastic' impact on the continued vitality of First Amendment freedoms." *United States* v. *Robel,* 1967, 389 U.S. 258, 88 S.Ct. 419, 19 L.Ed.2d 508.

Several state interests purportedly furthered by Article 14.10(b) are urged by the Appellants as legitimizing justifications for Article 14.10(b)'s undeniable encroachment upon First Amendment liberties. As will be seen, however, all of these concerns have been previously considered by the Courts in the context of First Amendment cases and all of them have been held insufficient to justify curtailment of constitutional guarantees of political anonymity and associational privacy.

Intially the state contends that Article 14.10(b) furthers the salutory effect of purifying the electoral process by pro-

viding a means of identifying persons responsible for fraudulent, deceitful, libelous, obnoxious or falsely attributed statements in a political campaign.[2] Interestingly, the State of Texas has not made any of these activities criminal by any statutory enactment other than Article 14.10(b), and that statute allows such conduct so long as the printer and the person paying for the advertising identify themselves. This absence of affirmative penal sanctions for the conduct allegedly exposed by Article 14.10(b) strongly suggests that the State's interest in this type of activity is neither as overwhelming nor as "compelling" as the Appellant might suggest. *Cf. Roe* v. *Wade,* 1973, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 at note 54 (fact that Texas has no other penal statutes protecting the life of a fetus rendered state's asserted interest in protecting prenatal life suspect).

Assuming, however, that the State of Texas possesses a legitimate desire to ferret out this kind of activity (an assumption rebutted by the dearth of other legislative activity prohibiting such conduct), *Talley* v. *California* considered precisely that state justification for a printer disclosure requirement and found it insufficient to overcome the printers' First Amendment rights to anonymity. In that case the state had argued that the ordinance was aimed at the prevention of "fraud, deceit, false advertising, negligent use of words, obscenity and libel," all of which were summarized by Mr. Justice Harlan as being "of an obnoxious character." The Court invalidated the statute nonetheless, and Article 14.10(b) suffers the same infirmity as the Los Angeles Ordinance struck down in *Talley* — neither statute is limited in its broad prohibitions to these obnoxious ac-

[2] Professor Emerson argues that, in general, "purification" efforts conflict with First Amendment Rights and are hence invalid. See T. Emerson, Toward a General Theory of the First Amendment 103-105 (1966).

tivities. Both enactments require printer identification on *all* political advertising, not merely that which is false, fraudulent, misleading or falsely attributed.[3]

The *Tally*-born rejection of identifying sources of obnoxious campaign material as a justification for infringement of First Amendment rights was underscored by the Three-Judge Court in *Zwickler, supra.*

> "It is true — if one were to follow Defendant's reasoning — that if every colporteur were constrained by statute to disclose whose money it was that paid the printer of the tract he hawks, the information thus extruded might in some instances blaze a trail to a criminal source or misuse of funds. A constitutional right of those privileged to speak with anonymity unbreached, however, may not be disregarded to facilitate the prosecution of others who by their offending may have forfeited that right.
>
> The current attitude of the Courts is to place the emphasis on the protection and preservation of the freedom of the many to advocate conduct or to reprehend misconduct in public affairs, not to redress the wrongs, real or fancied, of the individual office holder or aspirant for what is uttered concerning his past or prospective management of those affairs." *Zwickler* v. *Koota, supra,* 290 F.Supp. at 253-54.

The conclusion that the interest asserted by the state is insufficient to allow derogation of the printers' First

[3] Admittedly, Article 14.10 is somewhat limited by its application only to "political advertising", while the *Talley* ordinance encompassed all handbills, whether dealing with political matters, religious matters, commercial matters or otherwise. On the other hand, the *Talley* ordinance applied only to handbills, while Article 14.10(b) covers all types of political advertising, including billboards, handbills, books, campaign buttons, t-shirts and all other forms of printed campaign paraphernalia. Moreover, to the extent that certain types of speech are protected more avidly than others by the First Amendment, certainly *political* discussion deserves the broadest immunity from governmental intrusion of all kinds of speech. *New York Times* v. *Sullivan,* 1964, 376 U.S. 254; *New York Times Co.* v. *United States,* 1972, 403 U.S. 713. Cf. *New York* v. *Duryea, supra.*

Amendment rights is bolstered substantially by the fact that there are alternate means available to the state for effecting this very purpose without damaging the printers' constitutional rights so devastatingly. For example, a law prohibiting the dissemination of falsely attributed campaign material would effectively serve that state interest without requiring the printers to surrender rights to print anonymously. Similarly, a requirement that the printers supply a copy of all political advertising to a central depository where the identity of the printer would be available to interested persons would at least substantially minimize the deleterious effects inherent in the present law of widespread public dissemination of the printer's identity. Although such a scheme would encroach somewhat on the printers' rights of anonymity, it would materially reduce the substantial danger inherent in the present law that persons seeing Appellees' names on political advertising of particular candidates will mistakedly consider such association an endorsement of that candidate by the Appellees. Thus, this scheme would less drastically interfere with the Appellees' First Amendment rights, though some intrusion would be present nonetheless.

Thirdly, the state could provide for a coded number "bug" system similar to that presently used to identify union printers. In this system, each printer who undertook political advertising would be assigned a number and that number would appear on all political advertising printed by him. Any interested person could readily ascertain the name and address of the printer assigned that number. Again, the effect of such a scheme would be to minimize substantially the likelihood of reprisal or public misconception fostered by the present law.

Unless the state can persuasively demonstrate that these less restrictive means would not adequately further the

interests asserted, Article 14.10(b) must be declared unconstitutional.

A second justification posed in support of Article 14.10(b) is that it allows the voters to be informed about who is supporting particular political candidates or positions. Assuming for the moment that the voters have a right to know the name of the person paying for the political advertising, there is absolutely no reason why the public needs to be informed about the name and address of the printer, unless the public is supposed to infer that the printer supports that particular candidate or position. Here the state is in a hopeless dilemma. Either the statute suggests that the printer supports the candidate (in which case rights of associational privacy are clearly violated and the *NAACP* line of cases controls) or the requirement of printer identification does not provide the voters with any useful information (in which case this justification for the statute fails).[4]

At all events, the "informed voted" justification for allowing encroachment on First Amendment rights has been specifically considered and rejected by this Court. In *Andersen* v. *Martin,* Three-Judge Court, M.D.Ala., 1962, 206 F.Supp. 700, the Plaintiffs had challenged a Louisiana statute which required the race of a political candidate to be printed on the ballot. The District Court had upheld the law (despite the vigorous dissent of Judge Wisdom) on the grounds that the state could legitimately assist the voters in obtaining information about political candidates. The Supreme Court summarily reversed, declaring the statute clearly unconstitutional. The "informed voter" ra-

[4] The printers have specifically not objected to the requirement that the name of the person paying for the advertising be printed thereon, except to the extent that such phrase is ambiguous and manifestly in need of clarification as to its precise requirements.

tionale was plainly insufficient to justify the infringement of First Amendment rights. *Andersen* v. *Martin,* 1962, 375 U.S. 399, 84 S.Ct. 454, 11 L.Ed.2d 430.

In *Thomas* v. *Collins,* 1944, 323 U.S. 538, 65 S.Ct. 315, 89 L.Ed. 445, the "informed public" argument was again considered and rejected. In that case the State had required public speakers to register in advance and disclose certain basic information about themselves. The justification proferred by the State was that this modicum of information would assist the public in evaluating the speaker's comments by enlightening them of their background. The Supreme Court invalidated the ordinance, on First Amendment grounds, however, despite its service to the "informed public" function. See also, *DeJonge* v. *Oregon,* 1937, 299 U.S. 353, 57 S.Ct. 255, 81 L.Ed. 278.

The same result was reached most recently in *Lewis* v. *Baxley,* Three-Judge Court, M.Ala., 1973, 368 F.Supp. 768. In that case the Court invalidated a state statute requiring newsmen to disclose their interest in pending legislation. The State argued that this law provided information to the public on the newsmen's interests, so that the news reported could be properly evaluated by considering the bias of its source. The "informed public" function was undoubtedly served by the statute, but it was struck down nonetheless because the disclosures required violated First Amendment rights.

A third justification offered in support of the present statute is that it assists political candidates in replying to campaign accusations. Again, this justification has been considered and rejected by judicial authority. The argument was raised and swiftly rejected in *Koota, supra*: "Government assistance to a public figure, however, in ferreting out a "producer" whom he may the more easily identify and from whom he may secure damages as balm for his individual loss at criticism of his official performance weighs in the balance as too high a price to be exacted for First Amendment freedom of expression for all. The freedom to animadvert upon the public figures and affairs primes all others." 240 F.Supp. at 252-53. While the opportunity to reply to political accusations is certainly desirable, that opportunity in no way requires widespread public dissemination of the identity of a printer. Either the "bug" system or the centralized depository system mentioned above would allow a slandered candidate the ability to trace the source of the fraudulent campaign material without the dangers inherent in wide-spread dissemination of the printers identity on all political advertising. False attribution could be made a crime, precluding Segretti-type activities without infringing upon the printers' constitutional rights. In sum, the opportunity to reply can be sufficiently protected without the inhibiting requirement of widespread public disclosure of the printer's name and address.

Moreover, this Court has only recently considered at length and unanimously rejected "right to reply" arguments as justification for infringement on First Amendment rights of printers. In *Miami Herald Publishing Co.* v. *Tornillo,* 1974, U.S. , 94 S.Ct. 2831, this Court resoundingly disapproved a Florida "right to reply" statute because of the blatant unconstitutionality of requiring a newspaper printer to print that which he chose not to print.

The same result was reached in *Mills* v. *State of Alabama,* 1966, 384 U.S. 214, 86 S.Ct. 1434, 16 L.Ed. 2d 484. In *Mills,* Alabama had passed a law barring newspaper editorials on election issues or candidate on election day. The state had argued that this enactment was promulgated to insure that all candidate had an opportunity to reply to any political accusations. The Supreme Court rejected this justification, however, declaring that "it is difficult to conceive of a more

obvious and flagrant abridgment of the constitutionally guaranteed freedom of the press." Obviously, there is no material difference, so far as the First Amendment is concerned, between restricting what the press may print and affirmatively requiring that the press print particular matter. In either case, the justification of affording an opportunity to reply is insufficient to overcome the dictates of the First Amendment that there be no law enforced which "abridges" freedom of the press.

The fourth justification proferred in support of the Texas Election Code provision here contested is that it deters Segretti-type and Insco-type campaign "dirty tricks." The State of Texas, however, has not directed its penal sanctions against perpetrators of such illicit campaign mischief, but rather against the printers. *Lewis* v. *Baxley,* Three-Judge Court, M.D.Ala., 1973, 368 F.Supp. 768 demonstrates the inefficacy of this approach. In that case the State of Alabama had required that newsmen file a statement of economic interest stating that they were not employed by any employer having legislation pending before the state legislature. The State had argued that the enactment had deterred surreptitious lobbying by persons purporting to be members of the press. Admitting that deterence of unlawful lobbying constituted a legitimate state interest, the Court nonetheless invalidated the Alabama statute with the following remarks:

> "A part of the requirement of a substantial nexus • • • is the requirement that the State pursue its governmental interests narrowly rather than broadly.
>
> In the context of this case, that requirement means that the State may regulate lobbying and lobbyists as such, but the State may not require disclosure from occupational groups virtually at random upon the theory that one or more members may be lobbyists. If this is the governmental interest to be protected, the State should make its attack upon lobbyists as such."

That same reasoning applies to Article 14.10(b). If the State desires to prevent or deter campaign dirty tricks it should make its attack directly upon the perpetrators. To paraphrase *Lewis,* the State may not require disclosure from occupational groups [printers] virtually at random upon the theory that one or more members may be conduits to unethical campaign activities. Such an approach sweeps too broadly, where First Amendment liberties are at stake, and narrower, less restrictive means must be adopted. Requiring all printers of political advertising to identify themselves, at the risk of reprisal and intimidation, because a few printers may be used by unethical candidates to further illegitimate purposes is a remedy far more harmful than the malady allegedly cured.

Appellants' Cases

The Appellants' reliance on early cases (*Burrough & Cannon* v. *United States,* 1934, 290 U.S. 534; *Lewis Publishing Co.* v. *Morgan,* 1913, 229 U.S. 288; and *United States* v. *Harriss,* 1954, 347 U.S. 612, 74 S.Ct. 808, 98 L.Ed. 989) to support Article 14.10(b) is misplaced. The *Lewis Publishing Co.* case, decided in 1919, upheld an Act of Congress requiring any newspaper using the second-class mails to publish the names of its editor, publisher, owner and stockholders. The case was decided not on First Amendment grounds, but on the basis of Congress' plenary powers to control the mails. The Court simply decided that Congress' power to regulate postal service encompassed the authority to insure that organizations taking advantage of reduced rates for second-class mail came within the class of persons entitled to such cut-rate benefits. The law there challenged applied only to users of second-class mail privileges and did not require disclosure except by persons desirous of availing themselves of the benefits of lower mail costs.

The *Burroughs* case is similarly inapplicable here since the sole constitutional challenge presented in *Burroughs* concerned an alleged interference with the power of the state to appoint electors. No First Amendment issues were even considered in *Burroughs*.

With regard to *Harriss*, the significance of that case is in its *limiting* construction of the term "lobbying" as used in the Federal Lobbying Act so as to avoid widespread loss of political anonymity. The *Harriss* case must be viewed in light of the question it posed, namely whether the term "lobbying" should be broadly construed to impose registration requirements upon all persons whose activities directly or indirectly influenced the passage or defeat of any legislation, or narrowly, as the Court did, to encompass only direct communications with members of Congress. The Court chose the more restricted interpretation. The effect of *Harriss* was, therefore, to limit the authority of Congress to intrude upon First Amendment rights to political anonymity, not to expand them. See *NAACP* v. *Alabama, supra*, 78 S.Ct. at 1171; *Zwickler* v. *Koota, supra*, 290 F.Supp. at 255.

This reading of *Harriss* is reinforced by the case of *United States* v. *Rumley*, 1953, 345 U.S. 41, 73 S.Ct. 543, 97 L.Ed. 770. In that case the Defendant had refused to disclose to a House Select Committee on lobbying activities the names of the persons who made bulk purchases of his books. In order to avoid the "serious constitutional questions" regarding acknowledged First Amendment interest in political anonymity,[5] the Court defined the

[5] "Surely it cannot be denied that giving the scope to the resolution for which the Government contends, that is, deriving from it the power to inquire into all efforts of private individuals to influence public opinion through books and periodicals, however remote the radiations of influence which they may exert upon the ultimate legislative process, raises doubts of constitutionality in view of the prohibition of the First Amendment." *Rumley, supra*, 345 U.S. at 46, 73 S.Ct. at 546, 97 L.Ed. 770.

term "lobbying" as restrictively as possible so as to exclude Rumley's activities from the scope thereof and render consideration of the constitutional argument unnecessary. It is the same limiting definition process which *Harriss* represents as is evident from the Supreme Court's reliance on and interpretation of *Harriss* and *Rumley* in *N.A.A.C.P.* v. *Alabama, supra*, 357 U.S. at 461, 78 S.Ct. at 1171, citing those cases as standing for the principle that enactments threatening to abridge rights to political anonymity must be narrowly construed so as to avoid that result. See also, *Zwickler* v. *Koota, supra*, 290 F.Supp. at 225. *Harriss* does not, as the Defendants imply, sanction political identification enactments; it limits them.[6]

The only two recent cases which offer even remote support for the Defendants' position are *United States* v. *Scott*, N.D.Dak., 1961, 195 F. Supp. 440, and *United States* v. *Insco*, M.D.Fla., 1973, 365 F.Supp. 308. Neither of those cases is controlling or persuasive here, however, and both are distinguishable. In the first place, it should be noted that both cases are single Judge district court cases with no appellate history. More importantly, both cases involve the Federal Attribution Statute, 18 U.S.C.A. § 612. That statute is significantly different from the Texas Article 14.10(b) in at least two important respects: (1) The Federal Attribution Statute requires disclosure of the name of the persons "responsible" for the publication and the names of the officers of each such association. Thus, it is directed against active participants in a high level federal election campaign whose anonymity, as a practical matter, is generally nonexistent anyway. At all events, the Federal act is directed

[6] To the extent, if any, that *Harriss* can be read as approving some form of disclosure provisions despite First Amendment mandates, it was, of course, severely limited by the Supreme Court's subsequent decision in *Talley, supra*. See Redish, supra, 46 N.Y.U.L.R. 900,929.

toward the perpetrators of illicit activities, not the persons incidentially involved (such as printers). (2) The Federal statute is applicable only with regard to the offices of President, Vice President, Senator, Representative or Resident Commissioner to Congress. These are, of course, the highest political offices in the land. With so much at stake, the constitutional considerations weigh differently.

Thus, none of the interests conjured up by the State possess the requisite urgency to justify derogation of the Printers' First Amendment rights to print anonymously and associate privately. Indeed, alternative means are available to achieve each of the interests asserted by the State without the widespread impairment of constitutional liberties inherent in Article 14.10(b). In sum, the requirements of Article 14.10(b) are dangerously incompatible with the dictates of our Bill of Rights. Accordingly, the Three-Judge District Court correctly held the statute to be unconstitutional.

II.

ARTICLE 14.10(b) IS VOID FOR VAGUENESS IN CONTRAVENTION OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION

Two overpowering clarity gaps riddle Article 14.10(b).

(1) *Who is the "person paying for the advertising"?* This phrase could reasonably encompass any of a number of individuals. For example, it could refer to the advertising agency paying the candidate's bills; or it could contemplate identification of the campaign organization represented by the ad agency; or it could mean the person making a political donation earmarked for political advertising; or it could refer to the individual signing the check, or the messenger boy delivering it, or the candidate in

whose behalf the payment is really made. Confusingly, each of the several interests asserted by the state in support of the statute suggest a different answer to this perplexing question. Thus, if the legislature was seeking to prevent fraud, slander, and other obnoxious campaign material, the name of the campaign committee, organization or association from whose coffers the money ultimately came might be the appropriate party to list as the person paying for the advertising. On the other hand, if the purpose of the statute is to inform the voters of the source of a particular candidate's support, the initial contributor would be the appropriate person to identify as the person paying for the advertising. If, on the other hand, the purpose of the statute is to help the voter evaluate campaign material, the fact that the ad was designed by a particular advertising agency may be the disclosure contemplated by the statute. To the extent that the law is aimed at exposing the perpetrators of campaign dirty tricks, the individual within the campaign organization who was responsible for the particular ad would be the individual referred to by the statute (assuming that such individual was in any manner responsible for paying for the ad, which may not be the case in a large campaign using a voucher expense system). Finally, if Article 14.10 (b) is meant to provide an opportunity to reply, the name of the candidate on whose behalf the ad was paid for would be the proper party to identify as "the person paying for the advertising".

Dramatically underscoring the vagueness of the statute, the Defendants in their Brief in the lower court insisted that the "person paying for the advertising" "would, a fortiori, be either the candidate, his campaign manager or assistant campaign manager, or the campaign manager of a political committee" (excluding the advertising agent or

agency). Amicus Curiae supporting the Defendants, Common Cause, (which had drafted the legislation in the first place) disagreed in their Brief, insisting that "the person paying for the advertising" is the person "who has given the check that pays them" (i.e. the advertising agent, advertising agency or campaign donor). In its Application for Stay, the Petitioners suggested still another possible interpretation of the phrase:

> "It could be the person giving the money to the printers and publishers, the person, if paid by check, signing the check, the campaign manager of a campaign who under the Election Code is one of the persons entitled to authorize expenditures."

In the words of the Three-Judge District Court:

> "Article 14.10(b) which carries with it criminal penalties must be more explicit. The printers must not be left to a guessing game.
>
> The definition of 'persons paying for the advertising' should be left to the legislature for definition but as the statute now stands complying with it is *almost impossible* because it is 'so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application . . . .'" (emphasis added),

Court's Opinion at p. 30.

(2) *What is a "publisher"?* Black's Law Dictionary defines the verb "to publish" as "to make public; to circulate; to make known to people in general". This definition generally comports with lay dictionary definitions of that term. Webster's Seventh New Collegiate Dictionary, for example, defines "publish" as "to make generally known; to place before the public: disseminate." Thus, a person who circulates, hands out, or distributes political advertising would appear to be a "publisher" of such material, according to the dictionary. This interpretation would seem to most nearly

effect the claimed purpose of the statute in facilitating the discovery of the source of particular offensive political material and would require printing the name of the distributor of political advertising. On the other hand, the manner in which the term "published political advertising" is used in the statute suggests that the words printer and publisher are synonymous. The legislature may have meant the term "publisher" to refer to the person who prints political advertising which appears in newspapers, magazines and journals, as opposed to leaflets, hand bills, bill boards, t-shirts and the like which are printed by "printers" instead of "publishers".

A third definition of the term "publisher" is suggested by the realities of modern day political campaigns. For the most part, political advertising is designed, coordinated, circulated and distributed under the direction of professional advertising agencies. Within the trade, it is the advertising agency which "publishes" the political advertising, because it is the advertising agency which produces the material and supervises its release.

Thus, at least three different kinds of persons involved in the dissemination of political advertising could be reasonably deemed to be the "publisher" thereof. The legislature could be referring to the person physically circulating the material, the person printing it in a magazine, newspaper or journal, or the person responsible for the preparation of the ad, the advertising agency. The precise meaning of the term "publisher" is not ascertainable and, accordingly, the statute fails to set forth its requirements with requisite specificity.

Thus, it is apparent why the Three-Judge found Article 14.10(b) so vague as to be "almost impossible" to comply with.

The statutory vagueness of Article 14.10(b) is all the more repugnant because the statute clearly operates in

areas touching upon First Amendment rights. In this regard, the case of *U.S. Servicemen's Fund* v. *Eastland, supra,* is instructive. In that case the Federal Election Campaign Act had placed the media in the uncomfortable position of having to determine whether particular advertising was "on behalf of" or in denigration of any candidate for federal office. The problem (or more correctly, one of many problems) was that the statute offered no guidance for determining whether certain ads were "on behalf of" a particular candidate. In holding the law unconstitutional on vagueness grounds, the Court well stated the standard which controls the Texas law:

> "Having not only been placed in the unenviable position of enforcers of this statute, which is aimed at regulating politicians and not the media, but also faced with criminal sanctions for any questionable performance of this duty, the press is entitled to, and the constitution demands, proper guidance, free from ambiguity and vagueness."

Slip op. at p. 19. As enforcers of Texas policy, under threat of criminal sanction, the Appellees are similarly entitled to specific guidance, but Article 14.10(b) fatally fails to define its requirements with requisite specificity.

The Massachusetts Supreme Judicial Court recently reviewed and voided for unconstitutional vagueness proposed legislation in that state placing certain requirements on publishers of political advertisements. The Court stressed the need for precision in legislation regarding political advertising and ruled:

> "It would appear that the provisions above referred to would produce an unnecessarily chilling effect on the publication of any political advertising absent greater precision in definition and reasonable limitation of the phrases and provisions mentioned. To be avoided is the chilling effect of uncertain regulation on First Amendment rights."

Opinion of the Justices, Mass., June 29, 1972, 41 L.W. 2020.

The same admonition is apposite here. The dictates of Article 14.10(b), a statute undeniably regulating the exercise of First Amendment rights, are incapable of comprehension and fatally lacking in explicit direction. Men of common intelligence must be necessarily guess at its meaning and may reasonably differ as to its application. The statute is therefore void on its face, as the Three-Judge Court correctly concluded.

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, Appellees respectfully urge this Honorable Court to in all things affirm the judgment of the Three-Judge District Court pronouncing Article 14.10(b) of the Texas Election Code to be void on its face for its incompatibility with the mandates of the Constitution of the United States.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Gerald M. Birnberg, as Counsel for Appellees herein; hereby certify that true and correct copies of the foregoing Appellees Motion to Affirm have been served upon opposing counsel by placement in the United States mails, postage prepaid on this the ..... day of ....., 1974.

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